Office-Supreme Court, U.S.
FILED
AUG 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-767

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,

Appellant,

v.

EDWIN D. LEE

On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF AMICUS CURIAE OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

WILLIAM BENTLEY BALL
PHILIP J. MURREN
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108

Attorneys for Amicus National Committee for Amish Religious Freedom

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-6711

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the imposition of the federal Social Security tax on members of the Old Order Amish religion violate their rights protected by the Free Exercise Clause of the First Amendment?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	3
I. The Imposition of Sections 3101, 3111, and 3301 Upon Appellee Violates His Free Exercise of Religion	3
A. The Test to be Applied	3
B. The Appellee's Religious Liberty Claim	3
C. The Appellee's Religious Liberty is Here Violated	5
D. Imposition of the Social Security Program Upon the Old Order Amish is Not Justified by any Compelling State Interest	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: Page

Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U. S. 96 (1898) 9

Braunfeld v. Brown, 366 U. S. 599 (1961) 8

Gillette v. United States, 401 U. S. 437 (1971) 8, 9, 10

Johnson v. Robison, 415 U. S. 361 (1974) 8, 9, 10

McDaniel v. Paty, 435 U. S. 618 (1978) 8

Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U. S. 440 (1970) 9

Prince v. Massachusetts, 321 U. S. 158 (1944) 8, 9

Reynolds v. United States, 98 U. S. 145 (1878) 7, 8, 9, 10

Sherbert v. Verner, 374 U. S. 368 (1963) 3, 8

Thomas v. Review Board, 101 S. Ct. 1425 (1981) 9

Torcaso v. Watkins, 367 U. S. 488 (1961) 8

United States v. Ballard, 322 U. S. 78 (1944) 6

Watson v. Jones, 80 U. S. (13 Wall.) 769 (1871) 9

Wisconsin v. Yoder, 406 U. S. 205 (1972) 3, 4, 8, 12

Statutes:

26 U. S. C.:

§ 1402 .....12, 13

§ 3101 3

§ 3111 3

§ 3301 3

Other Authorities:

J. A. Hostetler, Amish Society (3rd ed. 1980) 4, 5, 6

L. H. Tribe, American Constitutional Law 7, 8

No. 80-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Appellant,

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

INTEREST OF THE AMICUS CURIAE

The National Committee For Amish Religious Freedom, with headquarters at 30650 Six Mile Road, Livonia, Michigan, is a nonprofit association formed in 1967 for the following purposes as stated in its articles of organization:

> "The protection, preservation, defense and advancement of the religious liberty and other humane and civil rights and liberties of the Amish community and similar religious groups, as well as the religious liberty and all other said rights of all citizens, and the elimination of religious prejudice and discrimination."

The National Committee is made up of professors, lawyers, clergymen and citizens from many religious faiths, all non-Amish. The Committee sees, in the present case, a serious threat to religious liberty.

ARGUMENT

I. The Imposition of Sections 3101, 3111 and 3301 Upon Appellee Violates His Free Exercise of Religion

A. The Test to Be Applied

Sherbert v. Verner, 374 U. S. 368 (1963) states the test that statutes which burden the free exercise of religion must meet if they are to be held constitutional in the face of First Amendment challenge. "Such imposition must be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* at 403. The Court illuminated the concept of "compelling state interest" as follows:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406.

And see *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972).

Under the *Sherbert-Yoder* test, therefore, it is necessary to inquire: (1) Does a genuine religious liberty claim exist? (2) If so, did the State violate that liberty? (3) If it did, is that violation nevertheless justified by a compelling state interest?

B. The Appellee's Religious Liberty Claim

The Amish Faith Community. A remarkable phenomenon in the midst of the American technological society of 1981, Amish communities continue to exist as utterly distinctive from the surrounding society. As a religious sect, the Amish have been described as "introversionist" rather than "conversionist" or "reformist", believing that "Salva-

tion is to be found in the community of those who withdraw from involvement in the affairs of mankind."[1] Merely to acknowledge, as does the Government here, that the religious beliefs of the Old Order Amish do not permit their participation in Social Security, scarcely does justice to the fact that religion is the essence, reason for being, and giver of total direction to the Amish community.[2] Among the most basic elements of historic practiced belief among the Amish are the principles of *separation from the world* (which involves the avoidance of anything but minimal involvement with government) and the interrelated principles of *mutual aid* and *self-sufficiency.* As to the latter, Professor Hostetler[3] has written:

> "The Amish people maintain positive religious teachings and attitudes toward helping all their needy members. They are deeply sensitive to any forces that would erode the principle of self-sufficiency in caring for their old people, widows, and orphans. Self-sufficiency is the Amish answer to government aid programs such as farm subsidies and social security payments. They comply with crop reduction programs but refuse payments for raising fewer crops. Amish leaders have repeatedly gone to Washington to seek freedom from federal aid. It is not that they are opposed to paying taxes, but they are opposed to any form of dependency on government.

---

1. B. WILSON, RELIGIOUS SECTS, 22 as quoted in J. A. HOSTETLER, AMISH SOCIETY, 7 (3rd ed. 1980).

2. See generally, HOSTETLER, *supra*, 21-24; 77-79.

3. Professor John A. Hostetler is Professor of Anthropology and Sociology, Temple University, and is the foremost authority on Amish society. His testimony in *Wisconsin v. Yoder*, 406 U. S. 205 (1972) was noted by the Supreme Court in its opinion. *Id.* at 212.

> The Amish opposition to compulsory insurance was widely publicized when social security benefits were extended (Public Law 761, January 1, 1955) to cover self-employed persons, including farmers. A delegation of Amish bishops made numerous trips to Washington seeking exemption from the tax and its benefits. Before congressional committees they contended that 'Old-Age Survivors Insurance is abridging and infringing to our religious freedom.' In support of their stand they quoted the Bible: 'if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel' (I Tim. 5:8). *To pay social security tax, the Amish say, is to admit that the government has a responsibility for aged Amish members, and to admit this is to deny the faith. They know that this alliance with government would make future generations dependent on the government. Federal means of providing for these needs are viewed as purely secular, if not sinful."* [4] (Emphasis supplied).

The District Court made findings of fact that (a) in the Amish faith it is a sin to allow an outsider to provide for one's own people (b) hence it is also a sin to accept governmental care (or equivalent monetary payment) for Amish aged, sick or unemployed (c) or to make payments into a program by which government would make such provision, irrespective of whether the benefits were accepted or not. Jurisdictional Statement, 3a, 8a. The Government did not dispute those findings.

C. The Appellee's Religious Liberty Is Here Violated

The Government's Position. There is no dispute that the appellee's religious liberty would be violated by en-

4. HOSTETLER, *supra*, at 264.

forcement against him of the provisions of Social Security legislation. The Government, however, considers the imposition of the structure a merely "incidental" burden upon the exercise of the Amish religion, and that any generally imposed income tax cannot have a "prohibited coercive effect on religious practice or beliefs." Brief for the United States, 8. The Government addresses itself to the appellee's view that it would be sinful for an Amishman to make payments into the Social Security program. The Government then volunteers its own *religious* judgment, on behalf of the Amish, that the payment is not really sinful at all. This is to say (according to the Government), the payment does not violate the precept of I Timothy, 5:8,[5] because (a) paying of the FICA and FUTA taxes does not prevent the appellee from providing for his own people, and (b) the Amish can simply refuse to accept Social Security benefits. Thus is presented a governmental exegesis on I Timothy 5:8 and a consequent governmental absolution from sin. And so the position of the government comes to this: If Amishman Lee's religious liberty is violated, the violation is *de minimis*; but in fact it is not violated at all.

The Free Exercise Violation is Substantial. The degree to which the free exercise of religion is violated herein is a question of fact. But the fact of substantial violation, like the fact of the existence of a religious belief itself, is to be found through examination of the believer, not from those outside the religion. *United States v. Ballard*, 322 U. S. (1953). As Professor Tribe has well stated:

---

5. Appellee, in the District Court, had cited I Timothy 5:8 as a Scriptural basis for refusal to conform to the Social Security statutes. The passage reads: "But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel."

"At the very least, it should therefore be clear that, when free exercise issues are raised, religious claims are to be examined not in terms of the majority's concept of religion but in terms of the social functions of the group, *or in terms of the role the beliefs assume in the individual's life.*" L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 831. (Emphasis supplied).

The propert test therefore is: *What is belief to the believer?* (Not: What is belief in the eyes of the Government?) The sincerity of the assumed believer is, of course, material. But here all acknowledge the sincerity of appellee. Jurisdictional Statement, 30; Brief for the United States, 7. The centrality of the belief, in the religion of the believer, is likewise of basic importance. Here there can be no doubt that resistance to payment into the Social Security program is based upon Amish concepts which are central to the faith. The Amish have long and universally—on religious grounds—declined to participate in any program which contains the principle that the government has responsibility for the sustenance of Amish people.[6] Well known Amish convictions with respect to separation from the world, mutual support, and self-sufficiency form the basis of Amish belief that to pay into the federal Social Security program is sinful. If, to them, that is so, then (whether justifiably or unjustifiably) the free exercise of the Amish religion is violated, not minimally but substantially, by the requirement of payment into the Social Security program.

The Government cites various decisions of this Court on behalf of its claim that here involved is merely an "incidental" burden on the exercise of religion. Brief for the United States, 17-19 (citing *Reynolds v. United States,*

6. See HOSTETLER, *supra,* 264-267.

98 U. S. 145 (1878); *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Johnson v. Robison*, 415 U. S. 361 (1974); *Gillette v. United States*, 401 U. S. 437 (1971); and *Braunfeld v. Brown*, 366 U. S. 599 (1961)). In none of these, except *Johnson* and *Braunfeld*, did the Court find a merely "incidental" burden on religious exercise; instead the *ratio decidendi* was the presence of a towering governmental interest. (See discussion *infra* at 9-10). *Johnson* involved merely a claim for veterans' benefits by a conscientious objector, the Court's opinion providing no details of any religious claim such as the Amish here advance. The Court in *Johnson* was thus able to conclude that the withholding of the education benefits involved, at most, an incidental burden on the objector's religious exercise. *Id.* at 485. *Braunfeld* involved the application of Sunday closing laws to Orthodox Jewish merchants. The Court held that this imposition constituted but an "indirect" burden on the observance of the religion involved. It is to be noted that *Braunfeld* was prior to the Court's decision in *Sherbert, supra*, and its conclusion must be regarded as doubtful in light of *Sherbert*.[7] In any event even the test set down in *Braunfeld* contains the important caveat that the state may not even *indirectly* burden the free exercise of religion if it "may accomplish its purpose by means which do not impose such a burden." *Braunfeld, supra*, at 607. As will be seen, such means are fully present in the instant case.

The Government also invited comparison with the burden on religious exercise found unconstitutional in *Sherbert, supra, McDanial v. Paty*, 435 U. S. 618 (1978), *Yoder, supra, Torcaso v. Watkins*, 367 U. S. 488 (1961)

7. "Justice Stewart was therefore right in concluding that *Braunfeld* cannot stand consistently with *Sherbert*, and in arguing that 'the *Braunfeld* case was wrongly decided and should be overruled'." TRIBE, *supra*, at 855.

and *Thomas v. Review Board,* 101 S. Ct. 1425 (1981). To this list the Government might well have added the imposition, different in kind, but not in degree, imposed in the present case.

The Government, however, goes on to argue that no violation of Amish liberties at all can be found, due to the aforementioned Government application of Scripture to the facts of this case. Here the Government beckons the Court in a direction which this Court has long held itself precluded from going. If a religious claimant establishes that particular conduct is forbidden to him by a teaching of his religion which is central to it, and if his claim is undeniably sincere, the courts are allowed "*no* role" to adjudge that the conduct is not actually forbidden by the religion. *Watson v. Jones,* 80 U. S. (13 Wall.) 679, 726-729 (1871); *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U. S. 440, 450 (1970).

Thus this appeal turns on but a single question: Is the imposition of the challenged statutes upon the Amish justified by a compelling state interest?

D. Imposition of the Social Security Program Upon the Old Order Amish Is Not Justified by Any Compelling State Interest.

A mere "public interest" does not justify the denial of religious liberty. If it did, any statute could override religious liberty since all statutes are presumed to be in the public interest. *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews,* 174 U. S. 96, 104 (1898). This Court's insistence that it be shown that a religious practice, if it is to be suppressed or curtailed, poses a threat to a *supreme* public interest is obviously essential to the existence of religious liberty. The Government alleges no such threat. Its citation to *Reynolds, Johnson, Gillette* and *Prince,* moreover, serves to highlight the fact that no

such threat exists by virtue of Amish non-participation in Social Security payments.

Reynolds, supra, was a prosecution for the federal crime of bigamy. Speaking from the moral climate of that time, the Court characterized polygamy (which practice was called for by the Mormon religion) as a crime which "has always been odious among the Northern and Western Nations of Europe" (*id.* at 164) and which indeed in England and Wales had been "made punishable in the Civil Courts, and the penalty was death," *Id.* at 165. Plainly the Court in *Reynolds* found a governmental interest in the suppression of a religious practice as one going to the very existence of society.[8] In *Prince v. Massachusetts, supra,* the Court similarly found a state interest in curtailing religious exercise far exceeding any to be found in the present case. *Prince* involved the employment of a nine-year-old girl to hawk religious magazines on city streets at night. The Court upheld the application, in the premises, of the Massachusetts child labor law under the doctrine of *parens patriae. Johnson v. Robison, supra,* is remote, on its facts, from the present case, involving merely a claim for veterans' benefits by a conscientious objector—the Court's opinion providing no specifics about any religious claim. *Gillette v. United States, supra,* while likewise inapplicable, again mirrors the extreme importance of the governmental interest required to be shown to overcome a free exercise claim. There conscientious-objector exemption from conscription was denied because of the government's interest in procuring the manpower necessary for the defense of the nation. *Id.* at 462.

8. "In fact according as monogamous or polygamous marriages are allowed, do we find the principle on which the Government of the People, to a greater or less extent, rests." *Id.* at 165-166.

Instead of describing a compelling governmental interest in requiring the Amish to pay Social Security taxes, the Government speaks of "the public need to maintain broad participation in the Social Security program" and claims that this interest is "more substantial" than the Amish religious claim. Brief for the United States, 24. At this point in its brief, the Government once again argues its own religious claim, namely, that the Amish can "protect the integrity of their own religious beliefs and practice simply by declining to accept Social Security benefits and continuing to provide support for those members of their community who are in need." *Ibid.*

The Government describes but a *single* governmental interest in its seeking to override the Amish religious claim: it is "the governmental interest in maintaining widespread participation in the Social Security program." *Id.* at 26. This interest it describes, not, of course, as publicly crucial but merely as "very substantial", here noting that Social Security benefits are only "to a certain extent", "dependent on the amount of taxes paid." *Ibid.* Amishman Edwin D. Lee's taxes "are commingled with other FICA and FUTA taxes and are used to support millions of other persons who need the benefits offered by the Social Security system." The Government thus emphasizes the obvious: that Mr. Lee's contribution is, from a dollar point of view, *de minimis.* The real focus of the governmental fear is the assumed domino effect of a holding that Mr. Lee need not pay. *Id.* at 27. To that contention it must be said:

a. Nothing in the record supports the view of the Government "that there may be far more widespread opposition to the Social Security system on asserted grounds of conscience by the narrow provisions of Section 1402(g)." *Ibid.*, fn. 15. The existence of the handful of

litigations over the past dozen years concerning that provision (*id.* at 30) is not even a minimal indication that, were the Amish declared constitutionally exempt from payments into the Social Security program, a legion of similar objectors would arise who could make the claim which the Amish make. There is not the slightest likelihood of that. But should some other body be able to prove a tradition, a sincerity, a community, a religion and religious conviction similar to the Amish now before the Court, the prospect of that event serves as no basis for denial of rights to the Amish today.

b. The "domino effect" argument appears to be a persistent theme in governmental efforts to curtail religious liberty. In *Yoder*, for example, the State of Wisconsin argued that "the necessary effect of [a decision in favor of the Amish], therefore, is to create a broad constitutional right to conscientiously object to education rather than a narrow exemption for a particular religion." Brief for the Petitioner [State of Wisconsin], *Wisconsin v. Yoder, supra*, 27. The Court did not acknowledge merit in this counsel of fear.

That no compelling governmental interest is to be found in the imposition here sought is manifest in the fact that the Congress enacted Section 1402(g). The Government points out:

> "The legislative history shows that, in enacting the exemption in Section 1402(g), Congress specifically intended to benefit members of the Old Order Amish sect. It found the exemption justifiable where individual members of the sect 'cannot accept the benefits of insurance including social security benefits, without renouncing basic tenets of . . . [their] religion' and 'sincerely believe that *payment* of Social Security taxes is irreconcilable with their religious convictions.'" (Emphasis supplied).

Thus it is clear that in the case of the self-employment tax, no compelling governmental interest exists, *even with respect to payments.* If no such interest can be identified under Section 1402(g), it is not possible that so great an interest exists in the remaining statutory provisions as to endanger benefits for those "millions of other persons" in the nationwide program.

Finally, it is clear that there are alternative means for achieving what the Government, somewhat tentatively, describes as a "very substantial" public interest. This is seen in the very fact that this interest will obviously be achieved with or without Amish participation. As the Government notes, Social Security benefits are only "to a certain extent" dependent on the amount of taxes paid, and the fact that a few Amish dollars would not be "commingled" with the contributions of millions of other persons will not affect the program. Insofar as the aim of Congress is to benefit the small Amish population of the nation, concern need not be had. Without the help of Government—indeed, *because* their care for one another is not governmentally programmed—the Amish will provide well for their own.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BALL
PHILIP J. MURREN
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Attorneys for National Committee for Amish Religion Freedom, Amicus Curiae

August 6, 1981